FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956.

No. 776

ASSOCIATED RESOURCES CORPORATION, A CORPORATION, JOHN W. SCHWARTZ, ROGER S. MILLER, M. A. WEST, RICHARD W. SATTERLEE, W. L. GIBSON, WM. A. KITCHEN, MARIAN E. MOULTHROP, EMELINE M. MORRIS, HELEN LOUISE KASSEBAUM, C. C. MADISON, DARRELL A. PORTER, GEORGE E. SAUDER, DELBERT E. MOSSMAN, HELEN L. VANCE, EMMA L. MADISON, AND MARY A. KITCHEN,
Petitioners,

vs.

HALLIBURTON OIL WELL CEMENTING COMPANY, A CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

ROGER S. MILLER,
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956.

No. .....

ASSOCIATED RESOURCES CORPORATION, A CORPORATION, JOHN W. SCHWARTZ, ROGER S. MILLER, M. A. WEST, RICHARD W. SATTERLEE, W. L. GIBSON, WM. A. KITCHEN, MARIAN E. MOULTHROP, EMELINE M. MORRIS, HELEN LOUISE KASSEBAUM, C. C. MADISON, DARRELL A. PORTER, GEORGE E. SAUDER, DELBERT E. MOSSMAN, HELEN L. VANCE, EMMA L. MADISON, AND MARY A. KITCHEN,

Petitioners,

vs.

HALLIBURTON OIL WELL CEMENTING COMPANY, A CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioners, Associated Resources Corporation, a Corporation, John W. Schwartz, Roger S. Miller, M. A.

West, Richard W. Satterlee, W. L. Gibson, Wm. A. Kitchen, Marian E. Moulthrop, Emeline M. Morris, Helen Louise Kassebaum, C. C. Madison, Darrell A. Porter, George E. Sauder, Delbert E. Mossman, Helen L. Vance, Emma L. Madison, and Mary A. Kitchen, pray that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Cirscuit entered in the above-entitled case on December 18, 1956.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Eighth Circuit is reproduced as Appendix A hereto.

The judgment of the Court of Appeals is reproduced as Appendix B hereto.

JURISDICTION.

The Federal jurisdiction is based on the diversity of citizenship among the parties and the amount in controversy is in excess of $3,000.00. The action was originally brought in the Circuit Court of Jackson County, Missouri, and was duly removed to the United States District Court for the Western District of Missouri. Summary Judgment dismissing petitioners' complaint was entered on April 19, 1956, and on May 5, 1956, the District Court overruled petitioners' Motion to Set Aside the Judgment and thereafter the case was appealed to the Court of Appeals for the Eighth Circuit where the procedure was challenged by the respondent in the form of a Motion to Dismiss the Appeal. This motion was overruled by the Court of Appeals and the original judgment was sustained by the Appellate Court on December 18, 1956.

QUESTIONS PRESENTED.

1. That the Court of Appeals has decided an important question of Federal substantive law which has not been, but should be, settled by the Supreme Court.

2. That the opinion filed by the Court of Appeals is in conflict with the decision of the Court of Appeals of the Fifth Circuit on the same subject.

STATEMENT OF THE CASE.

Petitioners are the owners, in various proportional amounts, of two oil and gas leases located in Greenwood County, Kansas. They have set up a five man committee for the purpose of managing the facilities of the interest holders. In the spring of 1954 the operating committee determined to drill another well, which was to be known as Lewis Well No. 9, and they made arrangements for effecting their purpose. A Mr. George Sauder was the lease man employed by the operating committee. At the direction of the committee, he called the respondent for the purpose of securing the cementing of the well. The respondent came to the well and presented a printed instrument to be signed. It is what is commonly known as a Work Order, and it contains the following exculpatory provision:

> "As a part of the consideration hereof, it is agreed that Halliburton Oil Well Cementing Company shall not be liable or responsible for any loss, damage or injury to said well resulting from the use of such cementing equipment, or for the acts of any person engaged in doing such work on the above described well." (Record page 9).

Mr. Sauder, without consulting his superiors, executed the agreement. According to the contention of your petitioners, respondent negligently performed its duties and ruined the well which had been shown to have good oil bearing sand. Your petitioners brought suit in the State Court and were duly removed to the appropriate District Court. The Chief Judge entered a Summary Judgment on the theory that the exculpatory provision was binding, and that there was no issue to present to the jury. The case was duly appealed to the United States Circuit Court of Appeals for the Eighth Circuit, which Court upheld the District Court.

REASONS FOR THE ALLOWANCE OF THE WRIT.

I.

The question of the validity of an exculpatory provision and the necessary ingredients to establish the same, is, of course, of public importance and has varied in degree of sanction throughout the history of American jurisprudence. It is the belief of your petitioners that the above question has become so prevalent, especially among the oil industry, regarding drilling of wells, that an enunciation of this Court would do immeasurable good in clarifying the duty of the cementing service people, such as the respondent. It must be borne in mind that most wells, to become effective producers, must be cemented in, and that this is a particular procedure of which there are not over one-half dozen companies in the United States efficiently equipped to perform such services. The respondent is preeminent in this field.

Your petitioners have sought to show that there has been a relatively great change in the law respecting such exculpatory provisions. Originally they were looked upon

with askance and allowed only when it was shown that the persons sought to be excused had divulged all the facts to the other party. *New York Central Railroad Company* v. *Lockwood*, 17 Wall. (N. Y.) 352. Later other Federal cases and most of the State Courts permitted such exculpatory provisions if the ingredient of fairness was carefully demonstrated. This is particularly true if a second requisite is added, namely, that there be a specific consideration.

The only case of recent times that your petitioners have been able to find in the reports of this Court is *Santa Fe, Prescott & Phoenix Railway Company* v. *Grant Bros. Construction Co.*, 228 U. S. 177. In that case a contemplative contract was entered into. All the pertinent facts were disclosed to the managing agents of both parties and a definite consideration was made to sustain such an agreement. The flux on this point of law has led to a more or less chaotic condition and, until this Court speaks, such condition will prevail, and this condition is especially deleterious to the oil production industry.

II.

Your petitioners believe that the opinion in the case at bar is in direct variance and conflict with the case of *Halliburton Oil Well Cementing Co.* v. *Millican*, 171 F. 2d 426. It is difficult to imagine a situation more congruent with the one at bar than the one detailed in the *Halliburton Oil Well Cementing Co.* v. *Millican, supra.* In fact, *the identical work order* (Italics ours) came before the two Circuits for review in both cases. In the Fifth Circuit the District Court did not enter a Summary Judgment but submitted the question of fact to the jury. A judgment was had for the plaintiff and an appeal was taken. The Court of Appeals reversed the judgment on other grounds, to-wit:

The plaintiff was not the full owner of the well. But, in so doing, the Fifth Circuit Court of Appeals thought the issues presented a question amounting to the dignity of a submissive issue to the jury. The question turns largely on whether or not the owners of the oil wells in both cases, namely, the one at bar and the one in the Fifth Circuit, were duly apprised of the conditions contained in the exculpatory provision. In the Millican case, Millican himself executed the Work Order. In the case at bar, Sauder, who was an interest holder, executed the instrument. In the case at bar the Court of Appeals thought there was no issue to submit to the jury. In the Millican case the Court of Appeals for the Fifth Circuit never doubted but that there was an issue to submit and the Court used this language as a rule for the trial of the case:

> "But we agree with appellee: that the evidence presented an issue of fact upon whether it was the agreement and upon whether plaintiff entered into it with knowledge of its terms exempting defendant from liability; and that it was not error to refuse a directed verdict on this ground. We agree with appellee, too, that a verdict should not have been directed for defendant on the other grounds it put forward, that the evidence was insufficient to raise the issue of negligence and insufficient to show the value of the well. We cannot agree with appellee, however, that the verdict and judgment must be affirmed." l. c. 429.

Also, we believe that the opinion of the Court in the case at bar is in direct opposition to the rule laid down in the case of *Celanese Corporation of America* v. *John Clark Industries*, 214 F. 2d 551, also decided by the Fifth

Circuit Court of Appeals. In that case an exculpatory provision, which contained the following operative words:

> "and the Buyer assumes all risk and liability whatsoever, resulting from the use of such material * * *." Footnote 4, l. c. 554.

was set up as a defense and the Appellate Court laid down the following rules, which we believe to be in conflict with the opinion of Appellate Court in the case at bar:

> "We are of the clear opinion that appellant's claim of exemption from the consequences of its negligence and gross negligence is without merit under the facts of this case. This is so because: (1) the 'acknowledgment' relied on was not contractual, the contract having already been made before the acknowledgment was sent to plaintiff's office; and (2) if it was a part of the contract and should be given effect as a covenant against warranting, it did not purport to, it did not, contract against its negligence and gross negligence." l. c. 554.

Your petitioners assert that the opinion in the case at bar upholding the District Summary Judgment is not only in conflict with the opinions on the identical same issue in the Fifth Circuit but, that it invades the province of the jury contrary to our accepted law.

PRAYER.

Wherefore, your Petitioners respectfully pray that a Writ of Certiorari be issued to the United States Court of Appeals for the Eighth Circuit to the end that this cause may be reviewed and determined by this Court, that the decree of the Circuit Court of Appeals be reversed, and the cause remanded to the District Court.

All of which is respectfully submitted.

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(Opinion.)

United States Court of Appeals

FOR THE EIGHTH CIRCUIT.

No. 15,637.

Associated Resources Corporation, a Corporation, John W. Schwartz, Roger S. Miller, M. A. West, Richard W. Satterlee, W. L. Gibson, Wm. A. Kitchen, Marian E. Moulthrop, Emeline M. Morris, Helen Louise Kassebaum, C. C. Madison, Darrell A. Porter, George E. Sauder, Delbert E. Mossman, Helen L. Vance, Emma L. Madison, and Mary A. Kitchen, Appellants,

vs.

Halliburton Oil Well Cementing Company, a Corporation, Appellee.

Appeal from the United States District Court for the Western District of Missouri.

[December 18, 1956.]

Roger S. Miller and C. C. Madison for Appellants.

J. D. James (Robert O. Brown, Robert E. Rice, William S. Hogsett and Joseph R. Hogsett were with him on the brief), for Appellee.

Before SANBORN, WOODROUGH and JOHNSEN, Circuit Judges.

SANBORN, Circuit Judge.

This is an appeal from a summary judgment determining (1) that the plaintiffs (appellants) were entitled

to nothing upon their claim for $25,000 damages for the alleged destruction of an oil well asserted to be due to the negligence of the defendant (appellee) in the performance of its contract for the cementing of the well, and (2) that the defendant was, upon its counterclaim, entitled to $264.05, the amount the plaintiffs had contracted to pay it as compensation for the use of its equipment and service men in the cementing of the well. Federal jurisdiction is based on diversity of citizenship and amount in controversy.

The issues presented by the defendant's motion for summary judgment were: (1) whether a provision of the "Cementing Work Order"—which order evidenced of the defendant's contract—that the defendant "shall not be liable or responsible for any loss, damage or injury to said well resulting from the use of such cementing equipment, or for the acts of any person engaged in doing such work on the above described well," was valid and enforceable; (2) whether George E. Sauder, one of the plaintiffs, who signed the "work order," had authority on behalf of his associates to hire the defendant to do the work; and (3) whether the plaintiffs were obligated to pay the defendant the amount specified in the contract to be paid for the use of the defendant's equipment and services.

The District Court concluded that none of the issues rose to the dignity of a genuine issue of fact, and that as a matter of law the defendant was not liable to the plaintiffs for damages, and that it was entitled to judgment against them for $264.05.

The facts which gave rise to this controversy are adequately and accurately stated by the trial court in its order for judgment. They need not be repeated.

The oil well in suit was located in Kansas. The contract in suit, dated May 29, 1954, was made and to be performed in Kansas. By its terms, the defendant rented cementing equipment to "Associated Resources, Owner, Operator or his Agent," and agreed to furnish men to deliver and operate the equipment, "under the direction, supervision and control of the well owner or his agent," for the cementing of the well. The "work order" made it clear that the work to be done by the defendant was to be done at the sole risk of the plaintiffs. It is reasonable to suppose that the exemption of the defendant from liability was reflected in the amount of its compensation for the work to be done. Compare, *Sinclair Refining Co.* v. *Stevens*, 8 Cir., 123 F. 2d 186, 192.

We agree with the District Court that the provision of the contract relieving the defendant of liability for loss or injury to the well was valid and effective both under the law of Kansas and the law generally applicable. *Thirwell* v. *Payne*, 108 Kan. 700, 701, 196 Pac. 1068; *Riddle Quarries, Inc.*, v. *Thompson*, 177 Kan. 307, 279 P. 2d 266, 270, and cases cited; *Santa Fe, Prescott & Phoenix Railway Co.* v. *Grant Brothers Construction Co.*, 228 U. S. 177, 192; *Sinclair Refining Co.* v. *Stevens*, 8 Cir., 123 F. 2d 186, 189-190; *Minneapolis-Moline Co.* v. *Chicago, M., St. P. & P. R. Co.*, 8 Cir., 199 F. 2d 725, 729; *Pennsylvania Railroad Co.* v. *Chesapeake & Ohio Railroad Co.*, 6 Cir., 229 F. 2d 721, 729, and cases cited.

We find no merit in the plaintiffs' contention that the question of the authority of Sauder, who signed the "work order" on their behalf, presented a genuine issue of fact. Sauder was a part owner of the well, had supervised the drilling of it, and was in charge of operations at the leasehold where the cementing operation took place. He supplied the cement which was used, and had to do with

directing the operation. It is enough to say that the showing made by the defendant in support of its motion for summary judgment was, in our opinion, sufficient to establish with adequate conclusiveness the implied authority of Sauder to engage the defendant to perform the cementing operation under the conditions specified in the "work order" and to obligate the plaintiffs to pay for the work.

The fact that the cementing of the well produced unfortunate results, if true, could not relieve the plaintiffs from the obligation to pay the defendant what they had agreed to pay. Their issuance of a check to the defendant for the work in the amount specified in the contract, even though payment was subsequently stopped, was a recognition of their contract obligation.

The case of *Halliburton Oil Well Cementing Co.* v. *Millican*, 5 Cir., 171 F. 2d 426, upon which the plaintiffs place reliance, is of no help to them. That case involved the same kind of a "work order" but the work was done before the work order was signed, and there was a genuine issue of fact as to whether the work order was the contract under which the cementing operation was performed. The court said (page 429 of 171 F. 2d):

> "We agree with appellant: that there is no public policy which forbids parties as between themselves from contracting against liability and that if it was established by undisputed evidence that work in this case was contracted for on the terms of the work order and that the contract for the work was entered into by plaintiff with full knowledge of the exemptions from liability of the work order contained, a verdict should have been directed for it. But we agree with appellee: that the evidence presented an issue of fact upon whether it was the agreement and upon whether

> plaintiff entered into it with knowledge of its terms exempting defendant from liability; and that it was not error to refuse a directed verdict on this ground. * * *."

In the instant case the "work order" was signed, before the work was done, by Sauder, who was shown to have authority to sign it on behalf of himself and his associates and to have been fully aware of its terms.

We have not overlooked the motion of the defendant to dismiss the appeal in this case as untimely. The judgment, we think, did not become final until the plaintiffs' motion to vacate it had been denied; hence the appeal was taken in time. See *Leishman* v. *Associated Wholesale Electric Co.*, 318 U. S. 203, 205; *United States* v. *Muschany*, 8 Cir., 156 F. 2d 196, 197; *Payne* v. *Koehler*, 8 Cir., 225 F. 2d 103, 105.

The judgment appealed from is affirmed.

(Judgment.)

United States Court of Appeals

FOR THE EIGHTH CIRCUIT.

No. 15637 ..... September Term, 1956.

Tuesday, December 18, 1956.

Associated Resources Corporation, a Corporation; John W. Schwartz, Roger S. Miller, M. A. West, Richard W. Satterlee, W. L. Gibson, Wm. A. Kitchen, Marian E. Moulthrop, Emeline M. Morris, Helen Louise Kassebaum, C. C. Madison, Darrell A. Porter, George E. Sauder, Delbert E. Mossman, Helen L. Vance, Emma L. Madison, and Mary A. Kitchen, Appellants,

vs.

Halliburton Oil Well Cementing Company, a Corporation. Appeal from the United States District Court for the Western District of Missouri.

This cause came on to be heard on the record from the United States District Court for the Western District of Missouri, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the Judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

December 18, 1956.

FILED
MAR 1 1957
JOHN T. FEY, Clerk

No. 776.

In the Supreme Court of the United States

October Term, 1956.

ASSOCIATED RESOURCES CORPORATION, a Corporation, *et al.*,
Petitioners,

vs.

HALLIBURTON OIL WELL CEMENTING COMPANY,
a Corporation, *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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In the Supreme Court of the United States

October Term, 1956.

ASSOCIATED RESOURCES CORPORATION, a Corporation, *et al.*, *Petitioners,*

vs.

HALLIBURTON OIL WELL CEMENTING COMPANY, a Corporation, *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

No. 776.

Opinions Below.

The opinion of the Court of Appeals appears at 238 F. 2d 957; the District Court's opinion (unpublished) appears at p. 28 of the printed record in the Court of Appeals.

STATEMENT OF THE CASE.

Petitioners pray for certiorari to review a decision of the Eighth Circuit Court of Appeals affirming a summary judgment of the District Court for the Western District of Missouri (R. 28-33)*; which determined (a) that petitioners were entitled to nothing upon their claim for $25,000 damages for the alleged destruction of an oil well asserted to be due to the negligence of the respondent in the performance of its contract for the cementing of the well, and (b) that the respondent upon its counterclaim was entitled to recover $264.05, the amount petitioners had contracted to pay respondent as compensation for the use of its equipment and service men in the cementing of the wall. Federal jurisdiction was based on diversity of citizenship (Op. 2).

The issues presented by respondent's motion for summary judgment (R. 25-33; Op. 2), were: (1) whether a provision of the "Cementing Work Order"— which constituted the contract—that the respondent "shall not be liable or responsible for any loss, damage or injury to said well resulting from the use of such cementing equipment, or for the acts of any person engaged in doing such work on the above described well," was valid and enforceable; (2) whether one George E. Sauder, one of the petitioners, who signed the "Work Order," had authority on behalf of his associates to contract with respondent to furnish the equipment and men to do the work; and (3) whether petitioners were obligated to pay respondent the contract price for the use of respondent's equipment and service men.

*References to pages of the printed record below are "(R. ....)"; and to pages of the opinion below are "(Op. ....)."

The District Court concluded that there was no genuine issue as to any material fact involved, and that respondent's motion for summary judgment should be sustained (R. 33). Judgment was accordingly entered denying relief to petitioners upon their complaint, and entering judgment in favor of respondent upon its counterclaim for $264.05 in accordance with the contract (R. 33). The Court of Appeals affirmed (Op. 5).

The oil well in question was located in Kansas. The contract in question, dated May 29, 1954, was made in Kansas and was to be performed in Kansas. By its terms, respondent rented cementing equipment to "Associated Resources, owner, operator or his agent," and agreed to furnish men to deliver and operate the equipment, "under the direction, supervision and control of the well owner or his agent," for the cementing of the well. The "Work Order" made it clear that the work to be done by respondent was to be done at the sole risk of the petitioners. The exemption of respondent from liability, by the exculpatory clause included in the contract, was reflected in the small amount of compensation it was to receive for renting the equipment and furnishing the men to operate it. (Op. 3.)

The Court of Appeals held that the provision of the contract relieving respondent of liability for loss or injury to the well was valid and effective under the law of Kansas and under the law generally applicable (Op. 3). It is this ruling which petitioners seek to challenge by certiorari.

The Court of Appeals also held that George E. Sauder, one of petitioners, who signed the "Work Order," had authority on behalf of his associates to contract with respondent to furnish the equipment and the men to operate it (Op. 3-5). Petitioners do not here challenge that ruling.

The Court of Appeals also held that the respondent was entitled to recover from petitioners on its counterclaim the contract price for the rental of the equipment and furnishing of the men to operate it. In this connection the court pointed out that petitioners' issuance of a check to the respondent in the amount specified in the contract, even though payment was subsequently stopped, "was a recognition of their contract obligation" (Op. 4). Petitioners do not here challenge that ruling.

ARGUMENT.

I.

There is no federal question involved.

Petitioners' first contention is that "the Court of Appeals has decided an important question of Federal substantive law which has not been, but should be, settled by the Supreme Court." This contention is without merit inasmuch as the case involves no Federal question. The question involved is whether the exculpatory clause of the contract is valid under the law of Kansas, where the contract was made and was to be performed. This is a question of general and not of federal law; it is determinable by the state law. *Fox Film Corporation* v. *Muller*, 296 U. S. 207, 210.

The Court of Appeals determined this question of local law in these words (Op. 3):

> "We agree with the District Court that the provision of the contract relieving the defendant of liability for loss or injury to the well was valid and effective both under the law of Kansas and the law generally applicable. *Thirwell* v. *Payne*, 108 Kan. 700, 701, 196 P. 1068; *Riddle Quarries, Inc.* v. *Thompson*, 177 Kan. 307, 279 P. 2d 266, 270 and cases cited; *Santa Fe, Prescott & Phoenix Railway Co.* v. *Grant Brothers Construction Co.*, 228 U. S. 177, 192; *Sinclair Refining Co.* v. *Stevens*, 8 Cir., 123 F. 2d 186, 189-190; *Minneapolis-Moline Co.* v. *Chicago, M., St. P. & P. R. Co.*, 8 Cir., 199 F. 2d 725, 729; *Pennsylvania Railroad Co.* v. *Chesapeake & Ohio Railroad Co.*, 6 Cir., 229 F. 2d 721, 729 and cases cited."

That this ruling was in accordance with the controlling decisions of the Supreme Court of Kansas is shown by

the Kansas decisions cited (Op. 3). This is not denied by petitioners.

Jurisdiction of the District Court rested on diversity of citizenship and the state law was therefore controlling. *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, 71 *et seq.*

It should be noted, also, that the decision below is in accordance with this Court's decision in *Santa Fe, Prescott & Phoenix Railway Co.* v. *Grant Bros. Construction Co.,* 228 U. S. 177, 192, where this Court, in dealing with an exculpatory clause, quoted with approval the following:

> "There is no question of public policy involved in this contract, as in the case of a common carrier. It is well settled that the parties in such a case have the right to provide by apt language against liability for negligence. * * * The clause must be interpreted to include loss through negligence, because for loss not arising from negligence he would not be liable."

The Santa Fe case involved a contract between a railroad company and a contractor for construction of a roadbed; and the exculpatory clause provided that the contractor assumed "all risk and damage" and that the railroad company assumed "no obligation or risk." This Court held that the exculpatory clause would be enforced as written (pp. 188-189, 192-194). The decision of the Court of Appeals in the instant case is in accordance with that holding.

It is submitted that petitioners' first point is without merit and should be disallowed.

II.

The decision of the Court of Appeals is not in conflict with decisions of the Fifth Circuit Court of Appeals.

Petitioners' claim of conflict between the decision below and the decision of the Fifth Circuit Court of Appeals in *Halliburton Oil Well Cementing Company* v. *Millican*, 5 Cir., 171 F. 2d 426, is fully answered by the opinion below, as follows (Op. 4-5):

> "The case of *Halliburton Oil Well Cementing Co.* v. *Millican*, 5 Cir., 171 F. 2d 426, upon which the plaintiffs place reliance, is of no help to them. That case involved the same kind of a "work order" but the work was done *before the work order was signed*, and there was a genuine issue of fact as to whether the work order was the contract under which the cementing operation was performed. The court said (page 429 of 171 F. 2d):
>
> > " 'We agree with appellant: That there is no public policy which forbids parties as between themselves from contracting against liability and that if it was established by undisputed evidence that work in this case was contracted for on the terms of the work order and that the contract for the work was entered into by plaintiff with full knowledge of the exemptions from liability the work order contained, a verdict should have been directed for it. But we agree with appellee: that the evidence presented an issue of fact upon whether it was the agreement and upon whether plaintiff entered into it with knowledge of its terms exempting defendant from liability; and that it was not error to refuse a directed verdict on this ground. * * *.'
>
> "In the instant case the 'work order' was signed, *before the work was done*, by Sauder, who was shown to have authority to sign it on behalf of himself and

his associates *and to have been fully aware of its terms"* (Emphasis supplied).

Petitioners' claim of conflict with the decision in *Celanese Corporation of America* v. *John Clark Industries,* 5 Cir., 214 F. 2d 551, is also without merit. The facts in the *Celanese* case are obviously so different from those here as to make the case clearly distinguishable; in addition to which, that case was controlled by Texas law while the instant case is controlled by Kansas law.

In presenting their claim of conflict with Fifth Circuit decisions, the petitioners (at page 7) say that the opinion below "invades the province of the jury contrary to our accepted law." This ignores the principle that a summary judgment procedure does not infringe the right to trial by jury. *Fidelity & Deposit Co.* v. *United States,* 187 U. S. 315, 319-321; *General Investment Co.* v. *Interborough Rapid Transit Co.,* 235 N. Y. 133, 139 N. E. 216; *Port of Palm Beach District* v. *Goethals,* 5 Cir., 104 F. 2d 706, 709; *Lindsey* v. *Leavy,* 9 Cir., 149 F. 2d 899, 902, cert. den. 326 U. S. 783. A party has no right to have his case submitted to a jury if the case involves no genuine issue as to any material fact and the opposite party is entitled to judgment as a matter of law. Rule 56 of Federal Rules of Civil Procedure; 6 Moore's Federal Practice (2d Ed.), p. 2037, *et seq.* Compare Ex Parte Peterson, 253 U. S. 300, 310.

Conclusion.

It is respectfully submitted that the decision below involves no Federal question, and is not in conflict with decisions of the Fifth Circuit Court of Appeals. There is no special or important reason for a review by this Court inasmuch as the case simply involves a routine damage

suit for alleged negligence in performance of a contract, wherein the controlling state law was properly applied. The petition for certiorari should be denied.

Respectfully submitted,

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